gross dividend was $250,000, the whole gross dividend (or 100% of the gross dividend) would be $350,142. The difference of $107,142 between the gross dividend and the net dividend was deemed under section 40(6) of the Ordinance to be the amount of tax deductions from dividends.

At the end of the year of assessment 1958 the defendants were required under section 40(3) of the Ordinance to render to the comptroller a statement showing the sum of $107,142 as the total amount of tax deductions from shareholders' dividends during that year. The comptroller was required under the same section to compare such tax deductions with income tax payable by the defendants in respect of that year of assessment and the amount carried forward from the previous year. Upon such comparison the amount by which tax deductions exceeded the aggregate of income tax payable became a debt due from the defendants to the Government under section 40(4) of the Ordinance. It is common ground that this excess amounted to $74,825. There is no law under which they could retain this excess and carry it over against their future indebtedness in respect of income tax. The fact that no demand was made for the payment of this debt until 20th March, 1960 does not make them any the less liable, and it is no more relevant than a similar argument in the case of an ordinary debt where a creditor chooses to take his own time to make a demand upon his debtor so long as he does it within the period of limitation. In the circumstances there will be judgment for the plaintiff against the defendants in the sum of $74,825 and costs.

Judgment for the plaintiff.

Solicitors: *Braddell & Ramani.*

TAN HOI HUNG v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) February 12 1966]

[J.B. — Federal Criminal Appeal No. X 27/65]

Internal Security — Consorting with members of Indonesian armed forces and possession of arms and ammunition — Defence of duress — Penal Code, s. 94 — Sentence — Mitigating circumstances — Internal Security Act, 1960, ss. 57, 58 & 69.

Criminal Law and Procedure — Defence of duress — Mitigation — Reduction of sentence.

The appellant had been convicted of a charge under the Internal Security Act for consorting with Indonesian Armed Forces and sentenced to death. The defence raised was one of duress, that is that the appellant did what he did by reason of having been under the threat of death. On appeal,

Held: (1) the effect of section 69 of the Internal Security Act is to deprive a person accused of an offence punishable with death under Part II of the Act of the right to set up fear as something affecting his criminal responsibility and therefore the trial judge was right in disregarding any defence based on threats and fear of death inspired by threats;

(2) the appellant's story of threats should have been considered as something that might have afforded mitigating circumstances and as the learned trial judge had failed to apply his mind to this matter, the sentence would be reduced to one of imprisonment for life.

Case referred to:—

(1) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, P.C.

FEDERAL COURT.

T. G. Sim for the appellant.

Abdul Hamid bin Dato' Azmi (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was prosecuted on three charges under the Internal Security Act: for unlawful possession of a fire-arm in contravention of section 57(1)(a); for unlawful possession of ammunition in contravention of section 57(1)(b); and for consorting in contravention of section 58(1). On the first two charges he was acquitted and on the third charge he was convicted and sentenced to death.

Against that conviction and sentence he has now appealed.

The matter arose out of one of the recent numerous invasions of this country from Indonesia. Some time in March this year one of these invasions took place near Kota Tinggi which terminated in what was nothing short of a battle on 3rd April, 1965. It was a real battle in the sense that people were killed in the course of it. At or towards the end of that battle the appellant was arrested by security forces but there is no evidence of his active participation in that battle.

As regards how he came to be there, I propose to deal with the matter on the basis of his own account which is the basis most favourable to him and which in any event is not contradicted on any material point by any of the other prosecution evidence.

It is contained in a statement he made to the police after his arrest. That statement was a long and circumstantial one and when the time came for him to make his defence he repeated it from the dock.

Briefly, his story was that in 1963 he was engaged in his occupation as a fisherman at sea near Pontian. He was (to use his own word) "arrested" by Indonesians who put him into a boat where he was assaulted and locked up in a small cabin. After a voyage of some hours he was taken ashore to a house where he was confined for about 10 months. Then after various journeys which it is unnecessary to recount he was told that he was coming to Malaysia with a

number of Indonesian soldiers and was told to obey orders. He was told if he refused to obey orders he would be shot. He and a number of Indonesians embarked in a boat. He was the only non-Indonesian. The others were all armed. He was not armed, but he carried a drum containing food. The boat arrived in Malaya; the party landed and proceeded on their way on foot. All he did was to carry food. After about ten days they arrived at an estate and while they were eating the Malaysian security forces arrived and opened fire. Before the firing he had intended to run away but had no opportunity to do so. They all scattered. The following day he heard more firing and was coming out to surrender when he was captured. That was his statement in court. The only additional detail to be gathered from his statement from the dock was that at one stage of his stay in Indonesia he was taught the use of a stengun.

The admissions contained in that statement were the whole basis of the prosecution case and clearly if the case fell to be considered in accordance with the ordinary principles of criminal law, the trial judge would have had to consider whether or not the appellant had made out the defence of what is commonly called "duress", that is to say that he did what he did do not by reason of any evil mind but by reason of having been under the threat of death. The judge, however, refused to consider that defence because he took the view that in relation to this particular offence it was not available. The only ground of appeal that merits consideration is that in this he was wrong.

The offence of consorting for which the appellant was convicted is an offence punishable with death under Part II of the Internal Security Act and section 69 of that Act, which was presumably enacted in view of the decision of the Privy Council in the *Subramaniam* [1] case, provides that section 94 of the Penal Code shall have effect as if offences punishable with death under Part II of the Internal Security Act were offences included in Chapter VI of the Penal Code punishable with death.

The effect of that is clear when one looks at section 94 of the Penal Code which, I would observe, falls within the chapter setting out the general exceptions, and says that except murder and offences included in Chapter VI of the Code punishable with death nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence. It follows then as a matter of construction that by reason of section 69 of the Internal Security Act offences under Part II of that Act are not offences in relation to which duress is available as a defence.

That position has been fully accepted by counsel for the appellant who, however, has sought to avoid its consequences by an ingenious and, I must say, a superficially persuasive argument based on the actual wording of the section under which the appellant was convicted, the material words of which are:—

> "Any person who in any security area consorts with, or is found in the company of, another person who is carrying....any fire-arm,....in circumstances which raise a reasonable presumption that he intends, or is about, to act,....with such other person in a manner prejudicial to public security or the maintenance of public order shall be guilty of an offence against this Part and shall be punishable with death, or with imprisonment for life."

I pause here to observe in parenthesis that the words "or is found in the company of" following the words "consorts with" would appear to be used pleonastically rather than in the alternative.

On the actual wording of the section it has been argued that if the appellant was acting under the influence of fear of death inspired by threats held out to him by his Indonesian captors or companions as the case may be, then he could not in any sense of the word be said to be consorting with them because "consorting" connotes some sort of voluntary action and it could not be said that he intended to do something prejudicial to public security, because he was incapable in the circumstances of forming any such intention. There is on the face of it much attraction in that argument, and if there was any real substance in it would follow that the trial judge was wrong in not applying his mind to the question of whether or not there was such substance in the appellant's story as to justify him in saying there was doubt as to whether the prosecution had made out their case.

There is, however, a fallacy in the argument and the fallacy is that it confuses intention with motive. Here I would quote from the latest edition of *Kenny's* Outlines of Criminal Law (18th Ed., p. 31). The editor refers to *Austin's* Jurisprudence and then says this:—

> "'Intention' in this sense must be distinguished from 'motive'. 'Intention' indicates that a man is consciously shaping his conduct so as to bring about a certain event; 'motive' indicates the reason why he desires that event and therefore why he pursues his selected course of conduct so as to achieve it."

In other words, if a man knowingly does something then not only does he intend to do it but in the absence of anything to the contrary he must be taken to intend the natural and probable consequences. If he fires a pistol he must be taken to have intended to fire it and if the firing causes grievous hurt then he must be taken to have intended that consequence. But whether his intention be evil or criminal must depend on a number of other factors and the most important of these is motive. If his motive in

firing that pistol was dislike for his victim then he is guilty of a criminal offence. If, however, he did it because he was threatened with immediate death if he did not do so then by reason of section 94 of the Penal Code he is not guilty of any offence.

So in the present case there is no doubt, and it is admitted, that this appellant had received military training in the use of weapon; he had accompanied the Indonesians to this country; he was accompanying them in the jungle and carrying their food and this amounted to acting in a manner prejudicial to public security. These things he intended in the sense that he did them consciously. He formed ideas in his mind and his mind passed these to his physical members which acted in accordance with the messages they received from his mind. According to his own story the reason why he did those things, his motive, was that that he believed he was in constant danger of death if he did otherwise.

Had the general law of criminal responsibility been applicable the appellant would have been entitled to have his story considered as something affecting the question of whether the necessary ingredients of intention had been made out by the prosecution. But it seems to be clear that the effect of section 69 is to deprive him of the right to set up fear as something affecting his criminal responsibility and in the circumstances we are of the opinion (although we have arrived at the conclusion by a somewhat different road from that followed by the trial judge) that the trial judge was right in disregarding any defence based on threats and fear of death inspired by threats.

In the circumstances we think the appeal must be dismissed.

That, however, is not the end of the matter. This particular offence is not one for which the death sentence is mandatory. There is an alternative sentence of imprisonment for life. We have come to the conclusion that had the trial judge reached the conclusion which he had reached by the road followed by us and not by the road followed by himself he would have applied his mind to the appellant's story of threats as something that might have afforded mitigating circumstances. What the result would have been had he so applied his mind we are of course unable to say. Nevertheless, the appellant has been deprived of a chance which would otherwise have been open to him had the trial judge so applied his mind and in the circumstances we think we should reduce the sentence imposed on the appellant to one of imprisonment for life.

Appeal dismissed.

Solicitors: *Drew & Napier.*